FILED
MAY 15 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

18

No. 06-1595

IN THE

Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business

[1] Pursuant to Sup. Ct. R. 37.6, amicus notes that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief through consent letters filed with the Clerk's Office.

federation. It represents an underlying membership of more than three million businesses and organizations of every size, in every sector, and from every region of the country. The Chamber actively represents the interests of its members in court on issues of widespread concern to the business community. The Chamber has participated as amicus curiae in numerous cases before the Court, including many employment discrimination cases. *See, e.g.*, *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); *Burlington Northern & Santa Fe Ry. Co.* v. *White*, 126 S. Ct. 2405 (2006); *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999); *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742 (1998). This case concerns the scope of the retaliation provision in Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.*

Because Title VII covers virtually all employers with fifteen or more employees, 42 U.S.C. § 2000e(b), most of the Chamber's members are subject to Title VII. Retaliation claims are among the most frequent and fact-intensive claims employers face, and the Court's decision in this case will have profound implications for the business community, particularly with respect to how and when internal investigations are conducted. *See* Sylvia A. Bier, American Bar Ass'n, *Protect Against the Surge of Employee Retaliation Claims: Understanding Title VII and Its Application to Recent EEOC Cases*, 36 The Brief 3, at 15, (Spring 2007) (noting that from 1997-2006, retaliation charges filed with the EEOC grew steadily from 22.6 percent to 29.8 of all charges filed). In addition, because Title VII's retaliation provision is nearly identical to those contained in

other retaliation provisions, including the Americans with Disabilities Act, 42 U.S.C. § 12203(a), and the Age Discrimination in Employment Act, 29 U.S.C. § 623(d), the impact of this case on employers throughout the Nation is even greater. Accordingly, the Chamber has a vital interest in the Court's resolution of the issues in this case.

INTRODUCTION

Petitioner Crawford was interviewed by her employer's human resources department in connection with an internal sexual harassment complaint. Crawford was not the complainant. Several months after the investigation, Crawford was placed on administrative leave and then fired after outside auditors discovered serious book-keeping irregularities in the department she managed. Crawford subsequently filed suit against her former employer, the respondent, contending that she had been fired in retaliation for answering the human resource investigator's inquiries months earlier related to another employee's sexual harassment complaint. Concluding that Crawford had neither "participated" in a statutory proceeding nor "opposed" discrimination, as Title VII requires before its protections against retaliation attach, the Sixth Circuit affirmed the dismissal of her federal retaliation claim. Its decision was correct and should be affirmed.

SUMMARY OF ARGUMENT

Title VII declares that it is unlawful to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter," or "because he has

made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).[2] These carefully crafted statutory prohibitions are known respectively as the "opposition clause" and the "participation clause."

Petitioner Crawford cannot claim protection under either clause. She did not "participate" in a proceeding "under this subchapter," because her employer's internal misconduct investigation was not such a statutory proceeding. The "participation" clause is triggered only after a charge is filed with the EEOC; the courts of appeal to have considered the question *all* have held as much.

Nor, on this factual record, can petitioner claim protection under the "opposition" clause. She did not actively object to any sexual misconduct in the office; she simply cooperated with an internal investigation. Her cooperation with her employer's human resources department was commendable, but mere cooperation in an internal inquiry does not immunize petitioner from later adverse action. Title VII's "opposition" clause means just what it says: it protects employees who actively *oppose* unlawful employment practices, not those who passively cooperate in internal inquiries.

The current legal framework fully protects legitimate claimants and complainants from

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[2] Petitioner uses the phrase "under this title" instead of "under this subchapter," Pet. Br. 1 n.1; but it is clear that Section 704(a) refers to the Equal Employment Opportunities provisions found at 42 U.S.C. § 2000e– § 2000e-17.

suffering adverse action after registering objections to unlawful employment practices. The far more expansive interpretation petitioner proposes offers little if any more protection for legitimate retaliation complainants; but it would go a long way toward immunizing underperforming employees from remedial action—potentially for years after the fact—merely for answering questions posed to them in a standard internal human-resources inquiry. The judgment of the Sixth Circuit should be affirmed.

ARGUMENT

I. CRAWFORD'S CONDUCT DID NOT QUALIFY AS PARTICIPATION IN AN INVESTIGATION, PROCEEDING, OR HEARING UNDER TITLE VII.

A. The "Participation" Clause Broadly Protects Employees After Title VII Enforcement Proceedings Have Been Initiated—Not Before.

1. Title VII protects access to the statutory "machinery available to seek redress for civil rights violations and * * * protect[s] the operation of that machinery once it has been engaged." *Booker* v. *Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989); *accord Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997) (a primary purpose of the retaliation clause is "maintaining unfettered access to [Title VII's] remedial mechanisms"). "Accordingly, any activity by the employee prior to the instigation of statutory proceedings is to be considered pursuant to the opposition clause," not the participation clause. *Booker*, 879 F.2d at 1313. Mere "internal correspondence with one's employer

does not sufficiently invoke the statutory machinery available under [Title VII] to constitute the filing of a complaint or a charge." *Id.*

In the nearly two decades since the Sixth Circuit offered these observations about Title VII's retaliation provision, every court of appeals to have considered the same question has reached the same answer. An employee can only "*participate*" in a proceeding, investigation, or hearing under Title VII after a charge has been filed with the EEOC. *See, e.g.*, *EEOC* v. *Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (participation clause "protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC"); *Vasconcelos* v. *Meese*, 907 F.2d 111, 113 (9th Cir. 1990) (" 'The purpose of section 2000e-3's participation clause is to protect the employee who utilizes the tools provided by Congress to protect his rights' ") (quoting *Sias* v. *City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978)); *Tuthill* v. *Consolidated Rail Corp.*, 1997 WL 560603, at *3 (E.D. Pa. Aug. 26, 1997) ("In order to establish a claim under the 'participation clause,' the investigation, proceeding or hearing must fall within the confines of the procedures set forth in Title VII."), *aff'd*, 156 F.3d 1225 (3d Cir. 1998); *accord Byers* v. *Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000); *Brower* v. *Runyon*, 178 F.3d 1002, 1005 (8th Cir. 1999); *Cuffee* v. *Tidewater Cmty. Coll.*, 409 F. Supp. 2d 709, 720 (E.D. Va.), *aff'd*, 2006 WL 2310733 (4th Cir. 2006); *Berroth* v. *Farm Bureau Mut. Ins. Co.*, 232 F. Supp. 2d 1244, 1250 (D. Kan. 2002).

These courts all reached the same conclusion after analyzing the plain language of Title VII's participation clause, which requires that participation be in "an investigation, proceeding, or hearing *under this subchapter*." 42 U.S.C. § 2000e-3(a). An investigation "under this subchapter" is an investigation conducted by the EEOC or its state and local counterparts, as the statute's structure makes clear. Section 2000e-3(a) refers to retaliation for conduct taken "in enforcement proceedings," and in particular, "in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Section 2000e-5 then spells out the statutory "[e]nforcement provisions," which include charges filed with and investigated by the EEOC, § 2000e-5(b), state and local enforcement proceedings, § 2000e-5(c), (d), civil actions filed by the EEOC or the person aggrieved, § 2000e-5(f), and appeals of civil actions, § 2000e-5(j). There is no mention in Title VII's enforcement provisions—or anywhere else in Title VII—of investigations initiated by an employer outside of any EEOC or state or local proceeding.[3]

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[3] Further confirming that the term "investigation" in the retaliation provision does not refer to employer-initiated investigations, the section of Title VII entitled "Investigations" deals only with investigations by "the Commission or its designated representative" and state and local agencies administering state fair employment laws. 42 U.S.C. § 2000e-8; *accord* 29 C.F.R. § 1601.15 (investigation "shall be made by the Commission, its investigators, or any other representative designated by the Commission").

Title VII's statutory language thus "specifically limits the participation clause of section 2000e-3 to proceedings 'under this subchapter.' Accusations made in the context of charges before the Commission are protected by statute; charges made outside of that context" do not qualify as protected activity under the participation clause. *Vasconcelos*, 907 F.2d at 113; *see Burlington Northern & Santa Fe Ry. Co.* v. *White*, 126 S. Ct. 2405, 2408 (2006) (describing participation clause as applying when an individual participated in "a Title VII proceeding or investigation"); *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 192 (1990) (rejecting interpretation of Title VII provision that "simply cannot be reconciled with the plain language of the text" of that provision); *Gilooly* v. *Missouri Dep't of Health & Senior Servs.*, 421 F.3d 734, 742 (8th Cir. 2005) (Colloton, J., concurring in part and dissenting in part) ("[T]he clause protects only participation 'under this subchapter,' so participation in an employer's internal investigation that is independent of the 'subchapter,' *i.e.*, not pursuant to an investigation by the EEOC or its designee, is not covered.").

Employees who participate in an employer's internal investigation prior to an EEOC charge therefore are not protected by the participation clause. Employees who participate in an investigation after an EEOC charge has been filed, in contrast, come within that clause's protections. *See Abbott* v. *Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2003); *Clover* v. *Total Sys. Servs., Inc.*, 176 F.3d 1346, 1352-53 (11th Cir. 1999). There is a good reason for this distinction. In conducting its investigation, the EEOC can consider evidence gathered by an employer. *See* 29 C.F.R. § 1601.15(a).

"Because the information the employer gathers as part of its investigation *in response to the notice of charge of discrimination* will be utilized by the EEOC, it follows that an employee who participates in the employer's process of gathering such information is participating, in some manner, in the EEOC's investigation." *Clover*, 176 F.3d at 1352-53.

2. Neither petitioner nor the government suggests that any court has adopted the position they advocate before this Court. And the courts' uniform interpretation of the plain language of the participation clause does not, as petitioner and the government suggest, leave employees unprotected from retaliation for statements made during an employer-initiated internal investigation. Courts have been equally consistent in holding that the opposition clause protects employees who "oppose" an unlawful employment practice prior to the initiation of Title VII proceedings. *See, e.g.*, *McNair* v. *Computer Data Sys., Inc.*, 1999 WL 30959, at *5 (4th Cir. Jan. 26, 1999) ("Because appellant alleges that [the defendant] retaliated against her for actions taken *before* she filed her first EEOC charge, however, we need only consider this claim under the terms of the section's 'opposition clause.' ") (emphasis in original); *Wilson* v. *Delta State Univ.*, 2005 WL 1939678, at * 2 (5th Cir. 2005). Indeed, the position advocated by petitioner and the Solicitor General would eviscerate the opposition clause; all allegations touching upon Title VII that were expressed to an employer during an internal investigation would be transformed into statutorily protected "participation" under Title VII. *See EEOC* v. *Total Sys. Servs.*, 221 F.3d at 1174 n.3 (noting that if every internal complaint was "protected activity

under the participation clause," then "[t]he statute's opposition clause would be rendered largely meaningless").

3. Petitioner's proposed expansion of the participation clause also would be particularly troublesome for employers; the protections offered by the participation clause are broader than those offered by the opposition clause. *See, e.g.*, *Slagle* v. *County of Clarion*, 435 F.3d 262, 266 (3d Cir. 2006) (participation clause "offers much broader protection to Title VII employees than does the 'opposition clause.' "). For example, under the "exceptionally broad protections of the participation clause," an employee is protected no matter whether "the contents of the charge are malicious or defamatory as well as wrong." *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000) (internal quotation marks and citation omitted); *accord Wyatt* v. *City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (there is no requirement under participation clause that "the charges be valid, nor even an implied requirement that they be reasonable") (citation omitted); *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969) (participation clause's protections apply even where content of EEOC charge is incorrect or malicious). Under the opposition clause, by contrast, protection turns on whether the employee's opposition was based on a good faith, objectively reasonable belief that the conduct being opposed violates Title VII. *See Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 270 (2001); *Brannum* v. *Missouri Dep't of Corrections*, 518 F.3d 542, 547 (8th Cir. 2008) (holding that "in the opposition clause context," an employee must prove that she had a "good faith, reasonable belief"

that the conduct violated Title VII) (internal quotation and citation omitted); *Jordan* v. *Alternative Resources Corp.*, 458 F.3d 332, 341 (4th Cir. 2006) (same); *Little* v. *United Tech., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997) (same).[4]

Adopting petitioner's position that anyone who participates in an internal employer-initiated investigation will receive broad participation clause protection thus would significantly expand the scope of the participation clause. Where participants in an employer-initiated investigation traditionally have been protected from retaliation for registering good-faith, reasonable opposition to unlawful employment practices, petitioner's position would result in broad

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[4] Petitioner suggests that the Court should adopt her position so that participants in an employer-initiated internal investigation can be protected from retaliation regardless of whether they lie, act in bad faith, or provide objectively unreasonable responses to the employer's internal investigator. Pet. Br. 35-36. But "Title VII was not designed to arm employees with a tactical coercive weapon under which employees can make baseless claims simply to advance their own retaliatory motives and strategies." *Mattson* v. *Caterpillar, Inc.*, 359 F.3d 885, 890 (7th Cir. 2004) (internal quotation and citation omitted). In any event, petitioner is incorrect to suggest that the good-faith determination turns on whether the employee's assessment of the unlawful employment practice was "inaccurate." Pet. Br. 36. It does not. Title VII affords significant protections to employees who inaccurately, but in good faith, believe an unlawful employment practice has occurred. *See, e.g., Dea* v. *Washington Suburban Sanitary Comm'n*, 2001 WL 672046, at *3 (4th Cir. June 15, 2001).

participation-clause protection for all employees involved in the investigation, even if no employee had filed an EEOC charge, and even if the employee's statements were neither objectively reasonable *nor* made in good faith. That outcome contravenes the participation clause's plain language and purpose.

B. The EEOC's Compliance Manual—In Contrast To Its Litigation Position—Comports With The Courts Of Appeals' Unanimous Interpretation Of The Participation Clause.

The Solicitor General suggests that the EEOC interprets the participation clause in a way that supports Petitioner. Gov. Br. 29. The EEOC's Compliance Manual shows otherwise.

The Compliance Manual identifies the first element of retaliation under the participation clause as "participation in a covered proceeding." EEOC Compliance Manual § 8 at 8-3 (May 20, 1998). The Manual further identifies the employees the participation clause protects:

> This protection applies to individuals challenging employment discrimination under the statutes enforced by EEOC in *EEOC proceedings*, in *state administrative or court proceedings*, as well as in *federal court proceedings*, and to individuals who testify or otherwise participate in *such proceedings*.

Id. at 8-9 (emphasis added). Thus, unless an individual is participating in "such proceedings"—*i.e.*, EEOC proceedings, state administrative proceedings, or state or federal court proceedings—

the participation clause is not at issue. The Manual reiterates that the retaliation provision protects "against retaliation for participating *in the charge process*." *Id.* at 8-10 (emphasis added). It applies to "all individuals who participate *in the statutory complaint process*." *Id.* (emphasis added).

To the extent the EEOC now argues that employer-initiated investigations come "under Title VII" so long as they touch upon conduct proscribed by Title VII, its litigation "position is, for the reasons discussed above, inconsistent with the plain language of the statute at issue. '[N]o deference is due to agency interpretations at odds with the plain language of the statute itself.' " *Gregory* v. *Ashcroft*, 501 U.S. 452, 485 n.3 (1991) (White, J., concurring in part and dissenting in part) (rejecting EEOC's attempt to rely on its litigation position in recent lawsuits) (quoting *Public Employees Retirement Sys. of Ohio* v. *Betts*, 492 U.S. 158, 171 (1989)). This Court has previously declined to defer to the EEOC's litigation position before the Court when that position is inconsistent with those previously taken by the agency and lacks support in the plain language of the statute. *See EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257-258 (1991).

C. The *Faragher/Ellerth* Affirmative Defense Has No Bearing On The Scope Of Protection Offered By The Participa-tion Clause.

The Solicitor General asserts that an employer-initiated investigation is one "under" Title VII—even though at the same time it narrowly defines "under" as meaning "subject to" or "governed by" Title VII.

Gov. Br. 17; *see also* Pet. Br. 23-24.[5] But an employer's internal investigation mechanisms are not "subject to" or "governed by" Title VII. Employers are free to initiate and conduct internal investigations any way they choose. The employer—not any statutory provision of Title VII—determines the scope of any employer-initiated investigation and sets policy on conducting internal investigations.

The sole argument offered in support of the Solicitor General's and petitioner's position is that in one specific subset of Title VII cases—where an employee alleges the employer is vicariously liable for a supervisor's sexual harassment even though no tangible employment action has occurred—some employers can assert the affirmative defense outlined in *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). There, the Court explained that an employer can avoid vicarious liability in a claim that a supervisor's sexual harassment created a hostile work environment not resulting in a tangible employment action if two requirements are met: the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and the plaintiff unreasonably failed to take

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[5] Petitioner (but not the Solicitor General) argues that employer-initiated internal investigations are "under" Title VII because employers "created" such practices "in response to Title VII," Pet. Br. 24, but that argument fares no better. . Employers have taken many actions in response to Title VII in an attempt to ensure more welcoming, productive workplace environments. That is no basis for concluding that every employer-initiated and employer-specific policy is "under Title VII."

advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. But the availability of that affirmative defense in a subset of hostile work environment claims has nothing to do with the scope of Title VII's retaliation provision. This court has already confirmed as much. *See Burlington Northern*, 126 S. Ct. at 2413 (noting that *Ellerth* and *Faragher* "did not discuss the scope of the general anti-discrimination provision"; in fact they "did not mention Title VII's anti-retaliation provision at all"), *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 143-144 (2004) (explaining that *Ellerth* and *Faragher* divide hostile work environment claims into two categories, one in which the employer is strictly liable because a tangible employment action is taken and one in which the employer can make an affirmative defense). *See also EEOC* v. *Total Sys. Servs., Inc.*, 221 F.3d at 1174 n.3 (rejecting EEOC's argument that *Faragher* and *Ellerth* require that the participation clause be interpreted to encompass taking part in an employer's internal investigation that is not prompted by, or part of, an EEOC charge).

There are at least two additional reasons to reject the argument that *Faragher* and *Ellerth* require interpreting the participation clause to protect all employees who provide information in an employer-initiated investigation. *First*, the argument ignores the opposition clause, which protects employees who oppose an employment practice that they reasonably believe violates Title VII. *Second*, an employer who retaliates against participants in a pre-charge internal harassment investigation not related to a tangible employment action would risk losing its ability to assert the *Faragher/Ellerth* affirmative

defense, which is available only to employers who "exercise[] reasonable care to prevent and correct promptly any sexually harassing behavior." *Ellerth*, 524 U.S. at 765. The rogue employer who retaliates against employees for participating in an internal investigation involving allegations of harassment will likely have a hard time proving that it exercised reasonable care to prevent and correct harassing behavior. *See Crawford* v. *Metropolitan Gov't of Nashville & Davidson County*, 2006 WL 3307507, at *4 (6th Cir. 2006) ("Certainly, a policy or practice of firing a person who testified negatively during an investigation into complaints of sexual harassment would not be 'reasonable.' ").[6]

II. CRAWFORD'S INTERVIEW RESPONSES DID NOT CONSTITUTE PROTECTED "OPPOSITION."

Section 704(a)'s opposition clause forbids an employer from retaliating against an employee because that employee "opposed any practice made an unlawful employment practice by this title." "Oppose" means "to confront with hard or searching objections" or "to offer resistance, to contend against or forcefully withstand." Webster's Third New International Dictionary Unabridged 1583 (2002); *see also* Random House College Dictionary Unabridged

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[6] Petitioner speculates about a flood of additional EEOC claims should the Court decline to adopt her view of the participation clause. *See* Pet. Br. 37-38. This conjecture has no basis. No court in the country has adopted the position she advocates; this Court's agreement with the unanimous view of the lower courts would not change the law from where it currently stands and has stood for decades.

933 (1980) (explaining that "to oppose is mainly to fight against, in order to thwart, certain tendencies, procedures, or what one does not approve").

The opposition clause sets a low threshold—but it is a threshold: it requires the employee to "convey to the employer his or her concern that the employer has engaged in a practice made unlawful" by Title VII. *Hinds* v. *Sprint United Mgmt. Co.*, __ F.3d __, 2008 WL 1795059, at *11 (10th Cir. Apr. 22, 2008). *See also Mongelli* v. *Red Clay Consol. School Dist. Bd. of Educ.*, 491 F. Supp. 2d 467, 483 (D. Del. 2007) (plaintiff must engage in "active 'opposition' to an unlawful employment practice for purposes of a Title VII retaliation claim").

Petitioner did no such thing. Indeed, petitioner apparently never mentioned Mr. Hughes's behavior until she was called into the investigatory interview; and even then, she limited her remarks to assertedly factual responses to the interviewer's questions. The Sixth Circuit therefore correctly concluded that petitioner did not engage in protected "opposition" because her conduct was limited to "cooperating with Metro's investigation into Hughes by appearing for questioning" at Metro's request and "relating unfavorable information." *Crawford*, 2006 WL 3307507, at *3. As the Sixth Circuit explained, conduct by an employee that "active[ly]," "overt[ly]," or "consistent[ly]" expresses an objection to an employment practice would clearly fall within the opposition clause, so long as the employee has a good faith, objectively reasonable belief the practice was discriminatory. *Id.* at *2-*3. Nothing in this record shows that petitioner did anything more than cooperate in an internal investigation by providing

assertedly factual information in response to the investigator's questions.

Courts have not hesitated to find an absence of protected opposition in similar circumstances. As the court explained in *Campbell* v. *Dominick Finer Foods, Inc.*, 85 F. Supp. 2d 866 (N.D. Ill. 2000):

> It is undisputed that Plaintiff never mentioned the [racially] offensive remarks to Dominick's until he was called into this investigatory meeting and asked what he heard. Only then did Plaintiff relate the remark. But even then he did not oppose it or otherwise object to it. Plaintiff thus was not "opposing" an action taken by his employer * * * . [*Id.* at 874.]

See also Fox v. *Eagle Distrib. Co.*, 510 F.3d 587, 592 (6th Cir. 2007) (court will not find protected "opposition" when it would "require reading something into the record that simply is not there").

Petitioner nonetheless contends that mere *cooperation* triggers the *opposition* clause. And the Solicitor General—now relying on the EEOC Compliance Manual it ignores during its discussion of the participation clause—also argues that the Court should infer "opposition" from mere disclosure. But Congress chose to use the verb "oppose"; the relevant provision is the "opposition clause," not the "cooperation clause" or the "disclosure clause." And there is no evidence in this record that petitioner made the statements she did in an effort to "confront" or "forcefully withstand" a Title VII violation, rather than simply to truthfully answer the Metro internal investigator's questions. Given the statute's emphasis on actual opposition to an

unlawful employment practice, it makes no sense to contend, as petitioner and her amici do, that an employee who truthfully responds with information about allegedly inappropriate conduct when asked during an investigatory interview is automatically deemed to have engaged in protected "opposition" to the conduct.[7]

III. A RULING IN PETITIONER'S FAVOR WOULD CHILL EMPLOYER-INITIATED EFFORTS TO INVESTIGATE AND REMEDY INAPPROPRIATE CONDUCT IN THE WORKPLACE.

1. Petitioner and her amici ask this Court to extend Title VII's retaliation provision to all employees who participate in employer-initiated investigations of possible Title VII violations, including all employees who do not register opposition to any unlawful employment practice, but rather merely disclose, confirm, or refer to potentially problematic conduct during the course of an investigatory interview. That expansive interpretation of the retaliation provision would create a entirely new class of employees protected by Title VII, and in the process would hamstring employers' efforts to implement legitimate

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[7] Petitioner and the Solicitor General both point to petitioner's statement that she felt "uncomfortable" around Mr. Hughes as demonstrating her "opposition." Pet. Br. 44; Gov. Br. 10. But this statement was not made during the internal investigation; it is lifted from her later deposition answer to the question "how did you find dealing with [Mr. Hughes]" and thus has no possible bearing on whether petitioner at an earlier time engaged in protected "opposition." J.A. 16.

performance standards and to take action against employees who fail to meet those standards.

Breeden establishes that employees who rely on "mere temporal proximity" between an employer's knowledge of protected activity and an adverse employment action must show that those two events were "very close" in time in order to establish a prima facie case of retaliation. Under petitioner's interpretation, however, virtually any employee who participates in an investigative interview related to Title VII or who discloses factual information suggestive of a Title VII violation could establish a prima facie case of retaliation if he or she experienced any adverse employment action in the ensuing months. Employers therefore would face the Hobson's choice of imposing a several-month moratorium on all adverse employment actions involving any employee who participated in an internal investigatory interview—or making the significant investment of money and resources necessary to rebut the employee's prima facie case of retaliation.

Even more troubling are the implications of petitioner's position for the many retaliation claims that do *not* rest entirely on asserted temporal proximity between the employer's knowledge of protected activity and the challenged adverse employment action. A decision to demote or terminate an employee may occur many months or even years after the employer first began to address deficiencies in an employee's job performance through periodic evaluations, changes to job duties, and similarly legitimate interim measures intended to help the employee meet the employer's legitimate

standards of performance. If an employee engages in protected activity (either through participation or opposition) after the employer begins to implement such interim measures—but long before any termination decision or other adverse action—the employee may be able to use such interim measures to bridge the temporal gap between protected activity and the adverse employment action. Indeed, a period of years between protected activity and adverse action may not immunize an employer from a retaliation claim when the employee can point to other occurrences in the workplace that he or she contends are probative of retaliatory intent. *See, e.g.*, *Fabela* v. *Socorro Indep. Sch. Dist.*, 329 F.3d 409, 417 (5th Cir. 2003) (holding that a reasonable jury could find that an employee discharged 6 1/2 years after a frivolous EEOC charge was fired in retaliation for filing the charge).

The expansive interpretation advocated by petitioner thus would enable poorly performing employees, simply because of the fortuity that their employer asked them to participate in an internal investigatory interview, to forestall (or force their employer to engage in a costly defense of) an adverse employment action at the conclusion of the progressive discipline process, long after the protected activity in which they engaged. This can reasonably be expected to have a profound chilling effect on employers' willingness to implement progressive discipline policies. Employers are legitimately concerned not only with preventing unlawful retaliation in the workplace, but also with avoiding the significant costs and burdens associated with defending against fact-intensive claims that a termination decision was motivated by retaliatory

animus arising from protected activity many years earlier. Because poorly performing employees can, and frequently do, rely on temporal proximity coupled with other evidence of allegedly poor treatment to create a retaliation claim, an expansive interpretation of the retaliation provision would vastly expand the universe of employees who are effectively immune from employers' legitimate termination decisions.

2. The expansive interpretation of Title VII's retaliation provision urged by petitioner and her amici also would undermine, rather than advance, the purpose of the retaliation provision.

For example, petitioner's position, if adopted, may encourage employers to consider individual employees' job performance when deciding whom to interview in an internal investigation. The existing legal framework—including *Faragher* and *Ellerth*—encourages employers to conduct prompt, thorough investigations to prevent and correct any harassing or other discriminatory behavior. That framework does not encourage employers to consider employee job performance in the course of deciding whom to interview. But if the retaliation provision is extended to cover every employee who participates in an investigative interview, employers will have strong incentives *not* to interview employees with performance deficiencies (at least where similar information is available from other sources), lest such employees become effectively immunized from adverse employment action simply because they responded to interview questions.

The practical result of petitioner's position thus would be that employers may limit to the extent

possible the universe of employees interviewed during the course of an internal investigations. If an employer reasonably believes that two employees with different performance histories may be privy to similar information, the employer may have a strong incentive to interview only the employee with the better performance record. Employers similarly may have an incentive to review each potential interviewee's job performance and to implement any potentially warranted disciplinary action *before* interviewing the employee in order to forestall a claim that the disciplinary action was in retaliation for the employee's mere participation in the interview process. Investigative interviews should not be linked—and under the existing legal framework are *not* linked—to employee job performance in this manner. Employers should be encouraged to conduct thorough investigations of reported harassment or discrimination without fear that a retaliation claim will ensue if the employer subsequently takes adverse action against any employee who participated in the investigative process.

Retaliation lawsuits are fact-intensive and expensive; few can be resolved before summary judgment.[8] And it is sadly not uncommon for

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[8] The Chamber offers sample policies for small businesses to help them steer clear of any grey areas by adopting policies that go *beyond* ensuring minimum compliance with federal law. Petitioner and some amici reference certain sample policies on the Chamber's website that fall into this category of advice. Recognizing the time and expense of retaliation claims, the Chamber's sample policies encourage employers to adopt standards designed not only to prevent unlawful retaliation, but also

employees, recognizing that their performance is viewed as substandard, to view an internal complaint procedure as an opportunity to insulate themselves from termination. Employers will be forced to risk impairing the value of internal investigations in order to avoid giving employees with performance problems potential retaliation claims if, after an internal interview, a decision is made not to promote, or to demote or terminate, a mediocre employee. Employers' ability to act in good faith to resolve internal complaints and promote compliance with Title VII thus may be hampered by concerns over inviting expensive litigation over retaliation claims.

3. Petitioner's position also would discourage employers from initiating an investigation on their own—as Nashville did—whenever they hear water-cooler rumors about inappropriate behavior. If an employer faces serious limitations on its ability to address everything from underperforming employees to changes in market conditions necessitating layoffs without risking a long battle over a retaliation charge, employers may be less willing to take the initiative to head off improper conduct before an employee directly files a grievance over it.

4. Finally, petitioner's interpretation may well impair the efficacy of workplace investigations by curtailing the use of investigative reports. Following an investigation, employers (as Nashville did in this case) typically prepare a report summarizing the results of the investigation and enumerating any

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to limit the number of baseless retaliation (and other discrimination) lawsuits they face.

corrective measures that should be implemented. Although the manner in which such reports are used and disseminated varies by employer, employers should be encouraged to prepare such reports in their continuing efforts to eradicate discrimination and train managers and human resources professionals about appropriate workplace behavior. Petitioner's interpretation would subvert these laudable goals because it would encourage employers not to circulate investigative reports to supervisors of under-performing employees—*i.e.*, the individuals who would make decisions about those employees' advancement or continued retention. Under petitioner's proposed regime, only an employer who strictly limited dissemination of the report's contents could make business decisions about promotions, discipline, and terminations with confidence that it could rebut a claim of retaliation by establishing that the relevant decisionmakers lacked knowledge of the protected activity. *See, e.g.*, *Maarouf* v. *Walker Mfg. Co., Div. of Tenneco Auto., Inc.*, 210 F.3d 750, 755 (7th Cir. 2000) (observing that the "critical issue" was "whether the person who made the decision to terminate his employment was aware of the discrimination allegations at the time").

That result plainly is troubling; human resources professionals and managers alike should be made aware early of internal personnel problems, including those that do not rise to the level of full-fledged employment law violations. A liability scheme that has the effect of encouraging employers to withhold results of investigative reports from managers of low-performing employees is not a regime to be lightly implemented.

CONCLUSION

For the foregoing reasons, as well as those in respondent's brief, the judgment below should be affirmed.

Respectfully submitted,

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